NO. 22275

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER E. CRAVEN, Warden, Folsom State Prison, et al.,	)
Appellant,	)
vs.	)
BILLY NORMAN GRIMM,	)
Appellee.	)

APPELLEE'S BRIEF

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STATEMENT OF ISSUES

WHETHER APPELLEE'S FEDERAL CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS ABRIDGED.

STATEMENT OF THE CASE

A. Nature of Case

Appellant has appealed to this court from an Order of the United States District Court for the Northern District of California Granting Appellee's Petition for a Writ of Habeas Corpus.

B. Course of Proceedings and Disposition in the State Courts and Federal District Court.

Appellant fully and fairly recounts the proceedings and disposition of this case in the courts below in his opening brief (Appellant's Opening Brief 1-3).

C. Statement of Relevant Facts.

The facts concerning the issues raised before this Court are fully and fairly stated in the August 4, 1967 Order of the District Court (RT 158-62). Relevant findings are reproduced here for ease of reference.

> "The facts are found to be as follows: Officer Le Sur and Officer Cornett of the Culver City Police Department were on patrol in their marked patrol car around 3:30 a.m. on January 16, 1962. As they drove eastward on Washington Boulevard in Culver City, they noticed a 1961 Chrysler station wagon on Sentney Street, which was either stopped or just beginning to pull onto Washington Boulevard ahead of the police car. The station wagon then proceeded eastward on Washington. At the same time the police officers observed the automobile pulling out onto Washington, they observed a man walking away from the car in a westerly direction on Washington. The officers then made a U-turn and approached the man seen walking away from the vicinity of the Chrysler station wagon, but as they approached, the man ran around a building and disappeared.

The officers then searched the area for the man, but without results, for around five minutes until they saw what appeared to be the same 1961 Chrysler station wagon heading west on Washington Boulevard. Their suspicions aroused, the officers followed the automobile and stopped it shortly thereafter.

"Up to this point, the facts are undisputed and in the sole knowledge of the police officers. What transpired subsequently is the subject of controversy. However, the Court is of the view that the variances in testimony are not dispositive for the most part and will accept the testimony of the police officers except where petitioner succeeded in convincing the Court otherwise at the evidentiary hearing.

"Officer Le Sur testified at trial that after stopping the car, petitioner stepped out on the driver's side of the station wagon and started walking back toward the police car, that Officer Cornett approached petitioner and asked for identification; that Officer Le Sur walked up to the right side of the station wagon, shined his flashlight into the car and observed a brown cloth bag lying on the front seat and a pry-bar and flashlight lying on the front floorboard on the passenger's side. Officer Le Sur then testified that he asked petitioner if he could have a look in his car, and petitioner said, 'Yes,

of the station wagon, Officer Le Sur testified that he looked under the front seat and saw two pairs of brown leather gloves under the front seat on the driver's side. He then tried the glove compartment, but found it locked and asked petitioner if he had a key, to which he replied, he did not have a key. He then looked in an open ash tray, found a key and used it to open the locked glove compartment. The glove compartment yielded two hand guns in holsters. At this point, without any knowledge that an armed robbery had actually occurred, he placed petitioner under arrest for armed robbery, placed him in the back seat of the patrol car and conducted a thorough search of the station wagon, which turned up four quarts of Canadian Club whiskey and a green bag containing money. These latter articles were found under the spare tire in the tire well just forward of the rear gate of the vehicle.

"Petitioner was then taken to the station and booked, after which a search of the green bag yielded a roll of coins with the name 'J-Nick's' printed on the side. A police unit was then dispatched to J-Nick's bar in Culver City, and later the arresting officers went to J-Nick's bar, where it was determined that someone had broken through the ceiling of the bar and removed money from

"At petitioner's trial, commencing March 12, 1962, the evidence seized from the Chrysler station wagon was introduced in evidence against him, and the jury ultimately returned a verdict of guilty of first degree burglary, Cal. Pen. Code § 459. No other incriminatory evidence was introduced at trial with the exception of some photographs of the scene of the alleged burglary and a statement made by petitioner to the police officers, which was basically consistent with his testimony at trial." (RT 158-161). (Footnote omitted).

SUMMARY OF APPELLEE'S ARGUMENT

The District Court, in finding that Appellee (hereinafter referred to as "Petitioner" for clarity) was convicted by a state court solely on the basis of evidence procured during the course of an illegal search and seizure, did not err. Rather, the facts of the instant case abundantly show that Petitioner was subjected to an illegal search and seizure in blatant violation of the rights afforded every citizen by the Fourth Amendment to the Constitution of the United States of America and made applicable to the States by the Fourteenth Amendment thereto.

ARGUMENT

THE SEARCH AND SEIZURE VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

A. Introductory Statement.

Petitioner contends, and the District Court in its Order Granting Petition For A Writ of Habeas Corpus dated August 4, 1967, found, that he was convicted on the basis of evidence obtained by an illegal search and seizure. (RT 157, 166-67).

Appellant challenges the findings of the District Court and attempts to justify the illegal search and seizure by arguing that: (1) Petitioner consented to the search; (2) the search of a locked glove compartment was a proper precautionary measure for the protection of the police officers; and/or (3) the police officers had probable cause for Petitioner's arrest and, therefore, the search was legal as being incidental to that arrest. These arguments have heretofore been rejected by the District Court. Petitioner contends that proper analysis of the facts, together with proper application of the law, commands such rejection by this Court.

Appellant fails to distinguish clearly the events which took place on the morning of January 16, 1962, when Petitioner was stopped and his automobile searched by the police officers. Proper analysis shows that the events occurred in four distinct stages: (1) The stopping of Petitioner's vehicle; (2) The initial, exploratory search of Petitioner's vehicle; (3) The arrest made on the basis of the fruits of the initial

search; and (4) The second search made after the arrest.

B. Constitutional Protection.

The right of every citizen to be secure in his person, house, papers and effects, against unreasonable searches and seizures is guaranteed by the fundamental law of the land. The Fourth and Fourteenth Amendments of the United States Constitution and the exclusionary rules set forth in Weeks v. United States, 232 U.S. 383 (1914) are applicable to officers and courts in every jurisdiction in the United States, state and federal alike. Mapp v. Ohio, 367 U.S. 643 (1961).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. The security of one's privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment and basic to a free society. Schmerker v. California, 384 U.S. 757 (1966).

As the Supreme Court noted in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), "We have recently held that 'the Fourth Amendment protects people, not places,' Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361, 19 L. Ed. 2d at 588 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion." The test of reasonableness under the Fourth Amendment is equally applicable to searches of automobiles and must be met before evidence obtained as a result of such searches is admissible. Preston v. United States, 376 U.S. 364, 367 (1964).

The protections afforded by the Fourth Amendment are implemented by the general rule that no search is lawful without a search warrant unless the search falls within an exception to that general requirement. Rios v. United States, 364 U.S. 253, 261 (1960); Jones v. United States, 357 U.S. 493, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951). The facts of the instant case clearly show that the exploratory search conducted by the Culver City police cannot survive the constitutional requirement that only upon a showing that the surrounding facts brought the search within one of the exceptions to the rule that a search must rest upon a search warrant may it be lawfully conducted without such a warrant. Rios v. United States, 364 U.S. 253, 261 (1960).

C. The Arrest.

Petitioner wishes at this time to focus upon the events leading up to the arrest. There can be no question that the arrest took place no later than that point in time when Petitioner was placed in handcuffs and informed he was under forma arrest. At this point in time, Officer Le Sur testified, and the District Court so found, that Petitioner was outside of his car. (RT 159). In addition, it should be noted that Officer Le Sur testified that his fellow officer had prior thereto frisked Petitioner for weapons. (TT-35*). Officer Le Sur testified that he placed Petitioner under arrest for armed robbery after discovering two holstered hand guns in the locked glove compartment of Petitioner's vehicle. As to whether the "arrest" took place prior to this time, note should be made of the federal rule laid down in Henry v. United States, 361 U.S. 98, 103 (1959).

Whenever the arrest took place, it is quite clear that prior to the exploratory search during which the two hand guns were found, there clearly was no probable cause for arrest and the District Court has so found. (RT 166).

The Supreme Court, in Kerr v. California, 374 U.S. 23 (1963) has made clear that states are free to apply different standards of arrest from those formulated by the Supreme Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts. It must, however, be remembered that overriding whatever rules a state may follow the protection of the Fourth Amendment is supreme. "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime - 'arrests' in traditional terminology." Terry v. Ohio, 391 U.S. 1, 16; 20 L. Ed. 2d 889, 903 (1968).

The California standards for arrest of a person in an automobile have been set forth in People v. Mickelson, 59 Cal. 2d 448 (1963), a case which in many ways is analogous to this one. In that case, the California Supreme Court noted:

> "[W]e have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation

then reveal probable cause to make an arrest the officer may arrest the suspect and conduct a reasonable incidental search." (People v. Mickelson, supra, at 450-51)

In the Mickelson case, although the police officer had investigated a recent robbery in the neighborhood; although the robber had been described to the police officer and was known to be armed with a gun, although a man fitting the description was observed by the officer driving an automobile about six blocks from the place of the robbery, although the automobile proceeded in an erratic manner so that it was obvious the driver was either trying to evade the police officer or was confused and did not know the area very well, although it was about 2 A.M. in the morning, and although the officer observed the passenger in the automobile bend forward in the seat and down and then raise back up, the California Supreme Court nevertheless held that an exploratory search by the officer after stopping the automobile exceeded the bounds of reasonable investigation. The court reasoned thusly:

"It was not unreasonable for the officer to stop Zauzig's car for investigation and to take reasonable precautions for his own safety. He did not have probable cause, however, to arrest Zauzig for robbery. There could have been more than one tall white man with dark hair wearing a red sweater abroad at night in such a metropolitan area. Although Zauzig was in the vicinity of the robbery, he was not observed until about

20 minutes after it occurred when he was driving toward the scene of the crime, not away from it. The officer had no information that the robber had an automobile or a confederate. The erratic route of the car and defendant's movement in the seat were at most suspicious circumstances. The officer's investigation elicited identification upon request and a story consistent with the movements of the car and the officer's own assessment of these movements. Both occupants were out of the car away from any weapons that might have been concealed therein. Instead of interrogating Zauzig and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation. It was not justified by probable cause to make an arrest, and it cannot be justified by what it turned up." (People v. Mickelson, supra, at 454.) (Emphasis added).

Whether or not the rule of reasonable detention set forth in the Mickelson case could withstand a challenge on constitutional grounds, Petitioner contends that the behavior of the police officers in the instant case exceeded even the liberal California rule.

In the August 4, 1965 Order of the District Court in this case, the Court noted:

> "In the instant case, the officers stopped petitioner's car solely on the basis of some sort of suspicion based upon unusual activities occurring very early in the morning. Although they at that time had no knowledge that a robbery might have been committed or reason to suspect that a robbery had been committed, they were justified under the Mickelson test in stopping petitioner's car. There is nothing in the record, however, to indicate that probable cause to arrest petitioner for a burglary existed prior to the discovery of the gund, and no formal arrest was made prior to that point. The mere fact that a suspicious automobile was in the area might have let out a man who ran from the patrol car and the fact that the officer saw a brown cloth bag on the front seat and a pry bar and flashlight under the passenger side of the front seat gave no cause to arrest petitioner for burglary. When petitioner was asked for permission to search the car and he initially gave permission, the only additional items found were two pairs of brown leather gloves. Although these items taken as a whole could corroborate independent evidence that a burglary had been committed, standing alone with only the suspicious

did not constitute probable cause to arrest for burglary, even if a formal arrest was made at this point." (RT 165-66).

D. Precautionary Search.

Appellant next seeks to justify the exploratory search of the locked glove compartment of the car as a proper precautionary measure for the protection of the police. To pose such an argument borders on the absurd. At the time of the search of the locked glove compartment, Petitioner was not in the vehicle. He had earlier walked away from the vehicle, was under the watchful eye of Officer Le Sur's fellow officer and may already have been frisked. That Petitioner posed no immediate threat to the officers is clear. That the search of the locked glove compartment cannot be justified as a necessary precaution is equally clear. See Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), and Sibron v. New York, 392 U.S. 40, 20 L. Ed. 2d 917 (1968).

E. Consent to Search.

Finally, Appellant seeks to justify the warrantless search as being based upon Petitioner's consent. The law in this circuit and elsewhere is quite clear that consent to search will not be presumed. The prosecution must establish that the consent was voluntary and the standard for determining that voluntariness is the same as that applied to waiver of a constitutional right. Montana v. Tomich, 332 F. 2d 987 (9th Cir. 1964); Channel v. United 285 F. 2d 217 (9th Cir. 1960); Cipres v. United States, 343 F. 2d 95 (9th Cir. 1965); United States v. Stanack Sales Co., 387 F. 2d 849 (3rd Cir. 1968).

Again, quoting the District Court in this case: "An analysis of the facts of the instant case shows that there was limited consent at best . . . . [C]onsent was needed for the officers to enter the automobile when petitioner was outside the car and away from it and posed no immediate threat to their persons. The facts are in conflict with respect to any consent to a search at all. Officer Le Sur testified that he asked the defendant if he could have a look in his car, and the defendant replied, 'Yes, go right ahead.' Petitioner testified that the officers proceeded forthwith to search his car after removing him from the car at gun point and did not seek his approval in any way. Assuming the officer's version of the facts is correct, petitioner's statement does not establish sufficient consent for the search that transpired. First, petitioner merely consented to letting the officers look in the car, not to a thorough rummaging about. Assuming the consent he initially may have given was sufficient to justify entering the car and looking around, thereby turning up the pairs of leather gloves, such facts did not in and of themselves justify the subsequent search of the glove compartment. The testimony is not in conflict that when the officers asked for a key to the glove compartment, the petitioner replied that he did not have one. Any consent which may

have existed at that point was terminated, and the officers were not free to continue the search, even though they found a key to the glove compartment in an open ash tray." (RT 163-64)

In Cipres v. U.S., 343 F. 2d 95 (9th Cir. 1965), under circumstances which might be classed as suspicious, police officers informed Cipres that they suspected her luggage which she was checking with an airline contained marijuana. Cipres denied the charge and, when asked, responded that the officer could search the bags; however, she added that she had left the keys elsewhere. The officer examined the bags, found them unlocked, and proceeded to search them. This court, on appeal, viewed the question as "whether Cipres had waived her constitutional immunity from unreasonable search and seizure." Cipres v. U.S., supra, at 97. Noting that the test of waiver in this context, means the "intentional relinquishment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), this Court said:

> "Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal

consent, and such cases are common. They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." (Cipres v. U.S., supra at 97, footnotes omitted).

This court has repeatedly reaffirmed this test. See Schoepflin v. United States, 391 F. 2d 390 (9th Cir. 1968); Oliver v. Bowens, 386 F. 2d 688 (9th Cir. 1967); Oliver v. Amiotte, 382 F. 2d 987 (9th Cir. 1967); Vanella v. United States, 371 F. 2d 50 (9th Cir. 1966);

In Schoepflin v. United States, 391 F. 2d 390, 398 (9th Cir. 1968), this Court, after setting forth the above principals, established that there cannot be an effective waiver unless under the described circumstances, the words used reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) the person in question knew may be freely and effectively withheld.

That the so-called consent in this case fails to meet this test is apparent and the District Court so found.

The District Court noted that:

"Petitioner made it quite clear at the evidentiary hearing that he knew the guns were in the glove

compartment and had no desire whatsoever to have the officers search the glove compartment and find the guns. He further indicated that he had some previous knowledge of the law of search and seizure, having succeeded after a prior arrest in having the charges dismissed on the grounds of an illegal search and seizure. The Court concludes that in the light of petitioner's knowledge of the presence of the guns, his background with the law of search and seizure and his denial that he had a key to the locked glove compartment, he can in no way be said to have unequivocally waived his right to rely upon a warrant or at least the existence of probable cause to arrest at that precise time. The mere fact that the exploratory search turned up two hand guns in the glove compartment, which led to placing him under arrest for burglary, in no way justifies the exploratory search."

While Petitioner's prior knowledge may be argued to be an indication that he had an understanding of the law of search and seizure, the first item in the four point test set forth by this Court, this understanding coupled with the uncontradicted refusal to produce a key to the locked glove compartment completely negates any possibility that Petitioner made an unequivocal election to grant the officers a license to search. In addition, and notwithstanding Petitioner's prior knowledge, no evidence has been introduced to show he was informed of his constitutional right to freely and effectively withhold consent.

In short, Officer Le Sur did not have consent to search the glove compartment of the automobile and was able to look in it only after a prior search disclosed a key. Officer Le Sur did not have probable cause to arrest at that point in time. The California doctrine of reasonable detention had long since spent itself -- one could hardly claim that it was necessary for the officers' safety to search a locked glove compartment when the only occupant of the car was already outside of the car and had himself been frisked. Viewed in its best light, the non-consensual opening and searching of the glove compartment can be only described as a blatant exploratory search of the kind prohibited by the Fourth Amendment of the United States Constitution. The activities of the officers did not come within the limited exceptions of the constitutional mandate to search only with a warrant and, therefore, were illegal.

CONCLUSION

For the reasons discussed above and in the August 4, 1967 Order of the District Court in this case, Petitioner respectfully submits that the District Court did not err in granting the Petition for a Writ of Habeas Corpus. Accordingly, Petitioner respectfully requests that the Order of the United States District Court for the Northern District of California Granting Petition For a Writ Of Habeas Corpus be affirmed.

Dated: February 19, 1968

Thomas A. Lee, Jr.
Attorney for Appellee by Order
of the United States District

CERTIFICATE OF SERVICE BY MAIL

I, Mary Jean Lamberson, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 120 Montgomery Street, 11th Floor, San Francisco, California 94104; I served two (2) copies of the attached Appellee's Brief on the following, by placing same in an envelope addressed as follows:

Attorney General of the State of California
6000 State Building
San Francisco, California 94102

Attention: Lawrence R. Mansir,
Deputy Attorney General

Said envelope was then, on February 19, 1969, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 1969, at San Francisco, California.

Mary Jean Lamberson

Mary Jean Lamberson